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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of) MM Docket No. _____
)
Amendment of Section 73.606(b)) RM-_____
Table of Allotments)
Television Broadcast Stations)
(Bend, Oregon))

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TO: The Commission

**REPLY OF 3-J BROADCASTING COMPANY
TO "OPPOSITION TO APPLICATION FOR REVIEW"**

1. 3-J Broadcasting Company ("3-J") hereby submits its Reply to the Opposition of Resort Broadcasting Company ("Resort") to 3-J's Application for Review in the above-captioned matter. As set forth below, Resort's Opposition merely attempts to compound the unfortunate confusion which has already tainted the Bureau's treatment of this case.

2. In its Application for Review, 3-J demonstrated that, historically, the Bureau has deferred consideration of "freeze-related" (*see Advanced Television Systems*, Mimeo No. 4074, released July 17, 1987 (52 FR 28346, July 29, 1987)) questions to the application stage, rather than address them at the allotment stage. In other words, even if a proposed allotment appears, on its face, to raise freeze-related questions, the Bureau has seen fit to grant the allotment. *Roseburg and Canyonville, Oregon*, 3 FCC Rcd 4311 (1988).

3. In its Opposition, Resort acknowledges that in the *Roseburg/Canyonville* decision the Bureau specifically considered -- and ultimately chose to ignore -- freeze-related factors in connection with a television channel allotment adopted a year *after* the freeze went

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into effect. Resort attempts to blunt this by asserting that the Bureau's discussion was "gratuitous". There is, however, nothing in *Roseburg/Canyonville* which gives *any* hint whatsoever that any aspect of that decision was merely "gratuitous". To the contrary, it appears from the decision that the Bureau's consideration of the freeze-related questions raised by the proposal was conscious, deliberate and intended to have precedential effect -- that, after all, is the only reasonable conclusion which can be drawn from the Bureau's own words, Resort's fanciful and self-serving interpretation to the contrary notwithstanding.^{1/}

4. The only other case cited by Resort -- *Weaverville, California*, DA 95-1858, released August 30, 1995 -- similarly supports 3-J here. In *Weaverville*, the Bureau *again* accepted for filing, and *again granted*, a television channel allotment proposal which was plainly subject to, and inconsistent with, the HDTV freeze. In so doing, the Bureau *again* demonstrated that, as a matter of policy, questions of compliance with the freeze are to be considered at the *application* stage. See *Weaverville, California*, *supra* at n. 4.

5. Attempting to counter this, Resort claims that the *Roseburg/Canyonville* and *Weaverville* allotments were somehow conditioned on the specification of sites in compliance with the freeze. Resort Opposition at 5. No such condition is apparent on the face of either decision. Indeed, to the contrary, in the *Roseburg/Canyonville* case, the application for that channel filed by the proponent of the allotment plainly did *not* comply with the freeze -- and

^{1/} Resort goes so far as to assert that the *Roseburg/Canyonville* language was "very carefully crafted to avoid the suggestion of a waiver of the freeze at the allocation stage." Resort Opposition at 5. But the lack of any such "suggestion" is hardly a basis for the conclusion which Resort self-servingly draws; the more logical conclusion for the lack of any discussion of waiver of the freeze in that decision is that no such discussion was necessary, inasmuch as that question would and should be addressed at the application stage, rather than the allotment stage.

yet, that application was granted! *KMTR, Inc.*, Ref. 8940-MLB (March 5, 1990). ^{2/} As a result, it is disingenuous for Resort to assert that compliance with freeze requirements is a "sine qua non" of the allotment process, when it is plain from the Bureau's own actions that such compliance is not even a "sine qua non" of the application process, much less the allotment process.

6. In its original petition for rule making, 3-J did include a demonstration that allotment of Channel 38 to Bend, Oregon, would not be inconsistent with the goals of the freeze. That showing was included because 3-J was mindful of the *Roseburg/Canyonville* and *KMTR* decisions. There, the Commission waived the freeze because, in the Commission's words, the Commission "[did] not believe that operation of Channel 36 in Roseburg will preclude use of that channel for ATV service in the Portland area." *KMTR, supra*. 3-J's showing, included in its original petition, clearly satisfied that standard. However, the Bureau has declined thus far even to acknowledge the details of 3-J's showing, much less to evaluate those details consistently with the above-quoted standard applied in *KMTR*.

7. Resort claims that 3-J was required, but failed, to make some kind of "compelling showing", the precise metes and bounds of which Resort declines to describe. Resort Opposition at 7. But Resort's claim flatly ignores the plain language of the *KMTR* letter, the arguments expressly advanced by 3-J in its Application for Review, and the showing submitted by 3-J in its petition for rule making. As noted above, the waiver

^{2/} The Weaverville allotment has not yet become effective, and it is thus not possible to determine what transmitter sites may be specified in applications for use of that channel.

standard which the Bureau clearly established in *KMTR* is whether the proposal will "preclude use of th[e] channel for ATV service" in the affected market. 3-J offered multiple factors, all of which demonstrate no such preclusion arising from the proposed allotment. The Bureau has never addressed 3-J's showing.^{3/}

8. Finally, Resort attempts to raise a couple of points which are obviously irrelevant here. For example, Resort claims that the Commission can and should, at this point, be concerned about the availability of a particular transmitter site for the proposed Bend transmitter. Resort Opposition at 7-8. Resort cannot be serious in this claim: the one clear lesson to be learned from the *Roseburg/Canyonville* and *KMTR* situation is that the Commission does *not* worry about the specific availability of a compliant site until the application stage -- and even then, the availability of such a site is *not* necessarily essential to grant of the application.^{4/}

9. With respect to the supposed transmitter site question, Resort also ingeniously argues that, even though Resort's claims about the supposed non-availability of the site in question were plainly unsupported and speculative, 3-J must be deemed to have conceded their accuracy because 3-J did not provide an affidavit supporting 3-J's counter-argument that

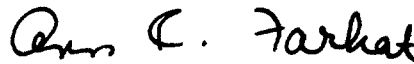
^{3/} Resort asserts that the existence of other channels in or near the affected community will not necessarily satisfy the "preclusion" test. Resort Opposition at 7. Since the particular facts and circumstances of 3-J's proposal have never been analyzed in any detail in this proceeding, it is impossible to say whether Resort's cavalier assertion has any validity at all. And in any event, Resort's claim does not acknowledge or address the additional detailed terrain preclusion showing included in 3-J's original petition.

^{4/} In a similar vein, Resort also addresses, in a footnote, the fact that 3-J's principal, Mark Metzger, is an employee of a broadcast/cable operator in Oregon. Resort Opposition at n.1. However, the purpose of this particular footnote is not at all clear, as the allotment process does *not* include consideration of such factors at all.

Resort's claims were unsupported and speculative. In other words, Resort seems to be saying that an affidavit is required to support the obvious observation that Resort's claims are unsupported and speculative. Resort's argument is ridiculous on its face.

10. 3-J has advanced a channel allotment proposal which would advance the public interest by, *inter alia*, permitting Bend to enjoy a second local commercial television service.^{5/} The Bureau has failed to act consistently with its own precedent, indeed, its own precedent in the same general geographic area. 3-J is entitled to full substantive consideration of its petition for rule making and, ultimately, allotment of Channel 38 to Bend.

Respectfully submitted,



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^{5/} The only other commercial television station operating in Bend is, not surprisingly, licensed to Resort, which thus has an obvious interest in interfering with 3-J's proposal and, thus, forestalling local competition.

CERTIFICATE OF SERVICE

I, Ann C. Farhat, hereby certify that, on this 25th day of September, 1995, I caused copies of the foregoing "Reply of 3-J Broadcasting Company to 'Opposition to Application for Review'" to be placed in the U.S. Postal Service, first class postage prepaid (or, as indicated below, hand delivered) to the following persons at the addresses indicated:

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